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In the Supreme Court of the State of Utah

JOSEPH LeROY PETERSON and
KATHRYN PEDERSEN PETERSON,
Plaintiffs and Respondents,

vs.

CUMORAH S. ELDREDGE,
Defendant and Appellant

Case No. 7768

APPELLANT'S BRIEF

FILED
JAN 18 1952
Clerk, Supreme Court, Utah

BEN E. ROBERTS
Attorney for Defendant

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TABLE OF CONTENTS

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library. Machine-generated OCR, may contain errors.

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INDEX OF AUTHORITIES

Cases

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not supported by the evidence and that the Court erred in its interpretation and application of the law.

STATEMENT OF FACTS

The plaintiffs listed for sale 2 pieces of property with the Inland Realtors, Inc. early in 1949. The 2 pieces of property adjoin each other north and south and measure 55 feet in width and 165 feet deep. For many years the property was divided into 2 tracts and were owned by the same person. On the north tract a duplex known as 372 and 374 D Street, Salt Lake City, Utah, was built many years ago and later a 2-storied brick house facing 7th Avenue, was built on the south tract and is known as 371 7th Avenue.

About the 6th day of April, 1935, Mrs. Anna J. Peterson, mother of the plaintiff, Joseph LeRoy Peterson, and her husband purchased the south tract from a man by the name of Bennett on which the 2-storied brick house stood, the abstract which was introduced in evidence showed that the dimensions of the property were 55 feet frontage on 7th Avenue and 110 feet deep. In 1938, 3 years later, Mrs. Anna J. Peterson and her husband purchased the north tract on which stood the duplex, from Bennett, the abstract showing the dimensions of this tract to be 55 feet wide and 64 feet deep. The elder Petersons purchased the property for income purposes. They remodelled the duplex into a triplex and they lived in the 2-storied brick house as their home but rented part of the property. After Mr. Peterson passed away, Mrs. Anna J. Peterson sold the entire tract of property in 1944 to her son, Joseph LeRoy Peterson, one of the plaintiffs in this

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action, on a Uniform Real Estate Contract. He took over possession and also took charge of the rentals of the apartments and his mother made her home with him and his family.

On February 23, 1949 both places were listed for sale separately and advertisements were run in the newspapers. The 2 addresses were listed but no description of the property by meets and bounds were given. The defendant saw the advertisements of 1 of the realtors and made an appointment to see the triplex.

At the time the defendant inspected the property nothing was said about the south boundary line or what the dimensions of the lot were. There was a chicken wire fence supported by small steel posts about 1 foot south of a cement walk that went around the south side of the triplex to the back door. It was covered with vines of last summer's vintage.

The defendant decided to purchase the triplex and signed an earnest money receipt on the 5th day of March, 1949 and deposited with the real estate company the down payment of $3,000.00. There was no description of the property in the earnest money receipt. On March 10, 1949 the defendant had the title examined, having been furnished with an abstract by the plaintiffs, and that was the first time defendant had been advised of the description of the property showing that the tract was 55 feet wide by 64 feet deep. About March 15, 1949 the contract in question was executed describing the property as it appeared in the abstract. The defendant took possession of the property on April 18, 1949 and moved into the place.

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There are several sharp conflicts in the testimony given by the respective parties in regard to the south line of the property. The defendant says the plaintiff told her that the fence marked the south 64-foot line of her property. The plaintiff says he does not remember that he ever told her that the fence was the south boundary of her property.

The defendant testified that in the latter part of May or June, 1949, when the Petersons came back from southern Utah, that she asked the plaintiff if the fence line was the south 64-foot line of her property and Peterson said, "Yes." She then said she asked him if he would sell her from 3 to 6 feet south of the fence, which he refused to do. Peterson admitted such a conversation took place at about that time.

When the defendant decided that she would sell this property or refinance it the defendant testified that she was informed by prospective purchasers that she did not have 64 feet of ground within the south fence line. At that time she decided to have a survey made. The day the stakes were set she advised Peterson that her south boundary line was 11 feet 9 inches south of the fence. When he complained about selling his back yard the defendant offered to sell part of it, but not all of it, back to him but no agreement was reached. However, Peterson removed the fence when she requested him to do so. In March of 1951 action was brought by plaintiffs to reform the contract on the grounds of mutual mistake.

STATEMENT OF ERRORS

The appellant relies upon the following errors for a reversal of the judgment in this case:

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POINT ONE

That the Court erred in making Finding No. 4 to the effect that the plaintiffs early in 1949 offered said triplex for sale and represented to the real estate company with which the property was listed that the said triplex property was north of said fence for the reason that there is not one scintilla of evidence in the record to substantiate said finding.

POINT TWO

That the Court erred in making Finding No. 5 to the effect that the plaintiffs believed that the fence line between the house and triplex corresponded with the dividing line between said properties as set forth in the legal descriptions of the properties in the abstract of title and other instruments pertaining to said properties; that plaintiffs relied on this belief in executing the real estate contract with the defendant.

POINT THREE

That the Court erred in making Finding No. 6 that the plaintiffs executed the real estate contract which is the subject of this action, intending to sell to the defendant the triplex with only that property north of the fence, for the reason that said finding is not supported by the evidence to the degree required by the rule in cases of mutual mistake.

POINT FOUR

That the Court erred in making Finding No. 7 that

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when the defendant purchased the triplex and executed the earnest money agreement and real estate contract she understood that she was purchasing only the property north of the fence, for the reason that said finding is not supported by the evidence to the degree required by the rule in cases of mutual mistake.

POINT FIVE

That the Court erred in making Conclusion of Law No. 1 that there was a mutual mistake of fact on the part of the plaintiffs and defendant with respect to the property described in the Uniform Real Estate Contract between them; that both parties intended that the said contract describe the property north of the fence separating the triplex from the house on the north, for the reason that the Court erred in its interpretation and application of the law as to mutual mistakes.

POINT SIX

That the Court erred in making Conclusion of Law No. 2 that, if the plaintiffs were in any way negligent in the execution of the real estate contract such negligence is excusable, for the reason that the Court misinterpreted the evidence and the law as to its application in cases of mutual mistake.

ARGUMENT

Point One

That the Court erred in making Finding No. 4 to the effect that the plaintiffs early in 1949 offered

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said triplex for sale and represented to the real estate company with which the property was listed that the said triplex property was north of said fence for the reason that there is not one scintilla of evidence in the record to substantiate said finding.

From the testimony of Mrs. Peterson, one of the plaintiffs, in regard to the listing of the property with the real estate company (7-52) (7-53), it appears that she did not make any statement in regard to the fence line. In fact, she testified that she did not know the dimensions of the property, that she only made a guess at it, that the real estate agent asked her questions which she answered as best she could and further testified that she did not know the dimensions of the entire tract of land, including the 2 pieces of property which were listed for sale.

The most probative evidence of the representations made to the Inland Realtors, Inc., appears in the listing (plaintiffs' Exhibit "A"), by Mrs. J. LeRoy Peterson, 1 of the plaintiffs in this action. The size of the lot is represented as 50x60, which undoubtedly referred to the width and depth and would place the south boundary line at at least 8 feet south of the fence. The evidence is positive that the chicken wire fence was never mentiond as the south boundary line of the triplex. The defendant says that it was never mentioned to her until long after she had occupied the property and Peterson testified that he did not recall ever mentioning to the defendant that the chicken wire fence was the south boundary of the triplex property. In paragraph 2 of plaintiffs' complaint, they set out the description of the property as it appeared in the written contract for the purchase of the both pieces of property giving

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the dimensions of each tract and signed and executed by them as well as the mother.

To say that these plaintiffs, after being fully conversant with the transactions by which the elder Petersons obtained the property from the Bennetts and the subsequent purchase by the plaintiffs of the property from the mother, did not know the dimensions of the tract were 55 feet by 165 feet, is unbelievable.

Point Two

That the Court erred in making Finding No. 5 to the effect that the plaintiffs believed that the fence line between the house and triplex corresponded with the dividing line between said properties as set forth in the legal descriptions of the properties in the abstract of title and other instruments pertaining to said properties; that plaintiffs relied on this belief in executing the real estate contract with the defendant.

Under this assignment we desire to call the Court's attention to the evidence of the record as to the fence line being the dividing line between the said properties as set forth in the legal descriptions of the properties in the abstract of title and other instruments.

The only evidence that I can find in the record to support the intention of the parties, is the bald statement and self-serving declaration that plaintiff Peterson said he intended to sell only that part of the property lying north of the fence (T-46) and that Mrs. Peterson made the same statement (T-47) and there is not one word of evidence that either of them ever advised Mrs. Eldredge of their intention.

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There is no evidence in the record as to any conversation had between the grantors and the grantee at or prior to the execution and delivery of the contract with regard to the boundary line or with respect to the land which the grantors intended to convey or the grantee intended to acquire. There is no evidence that defendant was buying the land as bounded by the fence. There was no evidence that the Petersons told her they were selling the land as bounded by the fence. The most that can be said of the evidence is that it shows the fence was not on the 64-foot boundary line set forth in the contract and as to whether or not there was a mutual mistake between the parties in writing or causing to be written in the contract an erroneous description of the property actually intended to be conveyed, the record is silent.

As a matter of fact, the record shows that, when the defendant first inspected the triplex with Clinton Madsen, a real estate agent connected with the Home and Garden Company, nothing was said in regard to the size of the lot. When the defendant decided to purchase the property she was presented with an earnest money receipt on the 5th day of March, 1949 and deposited with the real estate company the down payment of $3,000.00. There was no description of the property in the earnest money receipt. On March 10, 1949 the defendant had the title examined, having been furnished with an abstract by the plaintiffs, and that was the first time the defendant had been advised of the description of the property showing that the tract was 55 feet wide and 64 feet deep. The attorney's opinion called attention to the fact that the property was in the name of Joseph U. Peterson and Mrs. Anna J. Peterson, the father and mother of Joseph LeRoy Peterson, the plaintiff

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in this action. Mrs. Eldredge called the plaintiff, Joseph LeRoy Peterson, and asked him why the property was not in his name that he was selling to her. Peterson said that he was buying the property from his mother and that he had not had time to file the necessary papers showing the termination of the joint tenancy in his father, who had passed away, and obtain a deed from his mother. He promised at that time to have the proper instruments filed at the county recorder's office. The property of this date still stands in the father's and mother's name. About March 15, 1949 the contract in question was executed between the parties, describing the property as it appeared in the abstract. The defendant took possession of the property on April 18, 1949 and moved into the place.

In the case of Udelavitz vs. Ketchen, 190 Pacific 1029, the Court discusses the weight and sufficiency of the evidence to sustain a reformation of a contract on the grounds of mutual mistake: "Before relief can be granted either in an original action therefor or when relied upon as an equitable defense, it must appear that the mistake was mutual." and cites the following authorities:

> Hoback vs. Kilgores, 21 Atlantic Reports 317
> Houser vs. Austin, 10 Pacific 37.

Continuing its discussion, the Court says, "The evidence must be clear and satisfactory leaving but little if any doubt of the mistake. It must be made out by the clearest and most satisfactory testimony such as to leave no fair and reasonable doubt on the mind that the writing does not correctly embody the real intention of the parties. A mere preponderance of the evidence will not suffice and

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the burden of proof is upon the party alleging the mutual mistake" and then cites the following authorities:

French vs. Chapman, 13 Southeast 479
Farmville Insurance Company vs. Butler, 55 Md. 233.

The question of the degree of proof required to entitle a party to a reformation of a written instrument has been before this Court in a number of cases. The Court has also spoken on the weight and sufficiency of the evidence to justify a reformation of a written contract. In the case of George vs. Fritsch Loan and Trust Company, 69 Utah 460; 256 Pacific 400, the Court says: "The law is well settled that in this and other jurisdictions that a written contract will be reformed to express the agreement of the parties where the proof of the mistake is clear, definite and convincing and where the party seeking the reformation is not guilty of negligence in drawing the contract nor of latches in making timely application for the reformation."

In Nordfors vs. Knight, 90 Utah 114; 60 Pacific 2nd 1115, the Court says: "A written contract will be reformed to express the agreement of the parties where proof of mistake is clear, definite and convincing and where the party seeking relief is not guilty of negligence in the execution of the contract or of latches in making timely application for the reformation."

To the same effect in the case of Metropolitan Life Insurance Company vs. McClelland, 63 Pacific 2nd 657, the Court states that the evidence of the mutual mistake must be clear and satisfactory to justify reformation of a written instrument and the mere preponderance of the

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evidence is insufficient but such mistake need not be proved beyond a reasonable doubt.

Other Utah cases in which the weight and sufficiency of the evidence has been discussed are as follows:

Ewing vs. Keith, 16 Utah 312; 52 Pacific 4
Deseret National Bank vs. Dinwoodey, 17 Utah 43; 53 Pacific 215
Weight vs. Bailey, 45 Utah 584; 147 Pacific 899
Cram vs. Reynolds, 55 Utah 384; 186 Pacific 100
Wherritt vs. Dunn, 48 Utah 309; 159 Pacific 534.

Point Three

That the Court erred in making Finding No. 6 that the plaintiffs executed the real estate contract which is the subject of this action, intending to sell to the defendant the triplex with only that property north of the fence for the reason that the said finding is not supported by the evidence to the degree required by the rule in cases of mutual mistake.

The same rule applies to this assignment of error as set forth in the argument of Point Two. The only evidence of the intention of the Petersons that appears in the record, is the statement by Peterson (T-46) that he only intended to convey to the defendant the property north of the chicken wire fence and Mrs. Peterson made the same statement (T-47) but neither ever conveyed that intention to the defendant at any time prior to the execution and the delivery of the contract.

It is the contention of the defendant that this evidence is neither satisfactory, clear or convincing that such was

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the intention of the parties and it is the general rule that equity will not furnish relief where the mistake arose concerning facts in reference to which the party claiming this mistake had means of knowledge and may have ascertained the truth in regard to the mistake in the contract.

In the case of Monterey Park Bank vs. West Hollywood Bank, 13 Pacific 2nd 976, the Court held that a party cannot rely on his own negligence in failing to discover error in the amount of property conveyed.

Point Four

That the Court erred in making Finding No. 7 that when the defendant purchased the triplex and executed the earnest money agreement and real estate contract she understood that she was purchasing only the property north of the fence for the reason that said finding is not supported by the evidence to the degree required by the rule in cases of mutual mistake.

In regard to this assignment we submit that there is no evidence that the defendant was ever told that the chicken wire fence was the southern boundary of the property that she was to purchase. The transaction took place in the latter part of February and the first of March in the middle of the wintertime; the chicken wire fence was covered with morning glory vines of the past summer; there was nothing in the earnest money receipt which gave any description of the property except the address and the first time that the defendant was informed of the dimensions of the property in connection with this transaction was when she received a written opinion from her attorney,

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in which, among other things, she was advised that the legal title to the property was not in the name of Joseph LeRoy Peterson and his wife, plaintiffs in this action, but in the name of his father and mother. The defendant had a conversation with the plaintiff, Joseph LeRoy Peterson, asking him why the property that he was selling her was not in his name. It is uncontradicted that he explained to her that he was purchasing the property from his mother, that he had not had time to file the necessary papers showing the conveyance to him and the termination of the joint tenancy of his father who had passed away, but that he would have it taken care of immediately. This statement was made before the contract was ever executed by Peterson and his wife and the defendant, Mrs. Eldredge. The attorney's opinion showed that the property was 55 feet wide by 64 feet in depth and that was the amount of property that she understood she would purchase and no one had ever informed her to the contrary during the negotiations or prior to the execution of the contract.

It is interesting to note the testimony of Mr. Peterson (T-39) on cross examination:

> Q. "Did you ever tell Mrs. Eldredge that that fence was the south line of the 64 foot line?"
>
> A. "I can't say that I did, sir."
>
> Q. "So you don't know then what she believed or thought or understood then about that fence, do you, if you did not tell her that was the line?"
>
> A. "I don't know what she understood, sir."

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Q. "You say you never told her that that was the south line of that 64 foot lot?"

A. "I don't believe I did, sir."

The defendant, Mrs. Eldredge, testified that she was never informed that the chicken wire fence was the south boundary of her property until May or June of 1949 after the Petersons came back from southern Utah. At that time she said she asked Peterson if that was the south line of the 64 foot lot and he said, "Yes," and that she wanted to know if he would sell her from 3 to 6 feet on the south of the fence in order to be able to have some space to the south of her house. Peterson refused to do so. It is apparent that there was no participation in a mutual mistake on the part of the defendant, Mrs. Eldredge. The Petersons owned both pieces of property at the time that Mrs. Eldredge purchased the north tract and certainly the fact that there was a chicken wire fence 4 feet high covered with vines and flowers would give any indication that it was a permanent boundary line between these 2 tracts of property owned by the same person.

Point Five

That the Court erred in making Conclusion of Law No. 1 that there was a mutual mistake of fact on the part of the plaintiffs and defendant with respect to the property described in the Uniform Real Estate Contract between them; that both parties intended that said contract describe the property north of the fence separating the triplex from the house on the north for the

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reason that the Court erred in its interpretation of the applicaion of the law as to mutual mistakes.

This conclusion is based upon the evidence set out in Finding No. 5 and Finding No. 6 and it is our contention that it is based upon a misinterpretation and application of the law as to mutual mistake as hereinbefore set forth.

Point Six

That the Court erred in making Conclusion of Law No. 2 that if plaintiffs were in any way negligent in the execution of the real estate contract such negligence is excusable for the reason that the Court misinterpreted the evidence and the law as to its application in cases of mutual mistake.

Under this assignment of error it is apparent that the Court did not take into consideration the degree of proof necessary to reach such a conclusion. It is the general rule that in the absence of fraud or undue influence, a party cannot rely upon his own negligence or carelessness to reform a written instrument. In this case there is no doubt of the negligence of the plaintiffs. They were familiar with the history of the transactions of this tract of land for several years. Peterson had lived with his parents in the home on the south tract of land before he was married and he lived with them from July, 1935 until 1937. In 1938, his parents bought the north tract but they had used the property up to the duplex which they did not own for a period of 3 years. They rehabilitated the lawn, had a garden and grew flowers on the very property that is now in dis-

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pute. Mrs. Anna J. Peterson, the mother of the plaintiff, testified that they had occupied this property that did not belong to them for the reason that she knew some day later they were going to buy it.

In the case of Greve vs. Taft Realty Company, 281 Pacific 645, the question arose as to whether the testimony of the two officers of the realty company where they had not read the agreement and did not intend to bind the corporation, can be given any legal effect in an action to reform a deed, the Court held that the great weight of authority was against any such legal premise.

In the case of Goodrich vs. Lathrop, 29 Pacific 329, the Court held that under a statute of rescission of instruments, it was held that rescission cannot be adjudged for a mere mistake unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made.

The court by its decision has deprived the defendant of 11 feet 9 inches of property south of the fence line upon a theory of mutual mistake. We maintain that that evidence is insufficient to substantiate such a holding and that there is no evidence that the defendant, Mrs. Eldredge, was at any time advised of the intention of the plaintiffs and that she relied entirely upon the description of the property which the plaintiffs furnished to her in an abstract which she had examined and understood that the dimensions of the property were 55 feet in width by 64 feet in depth.

CONCLUSION

In conclusion, we submit that the evidence introduced in this case and under the arguments and authorities herein

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presented, the judgment of the Lower Court should be vacated and set aside and that the contract for the sale of said property be declared in full force and effect.

Respectfully submitted,

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not indicate the south limits of her property.

While plaintiffs' evidence of the mutual mistake must be clear and satisfactory to justify reformation of the real estate contract, and a mere preponderance of the evidence is not sufficient, it must be remembered that the plaintiffs do not have the burden of proving such mistake beyond a reasonable doubt. See *Metropolitan Life Insurance Co. v. McClelland,* 63 P. 2d 657.

Plaintiffs submit without lengthy recitation of the details of the evidence and without lengthy argument, that the record establishes the mutual mistake by evidence that is most clear, definite and convincing.

POINT II. PLAINTIFFS WERE NOT NEGLIGENT IN THE EXECUTION OF THE CONTRACT, OR, IF THEY WERE GUILTY OF ANY NEGLIGENCE, THE COURT DID NOT ERR IN CONCLUDING AS A MATTER OF LAW THAT SUCH NEGLIGENCE WAS EXCUSABLE.

When the court concluded as a matter of law that if the plaintiffs were in any way negligent in the execution of the real estate contract, such negligence is excusable, the court was well aware that these plaintiffs were familiar with the house and triplex properties. It was this very familiarity with the properties that caused the plaintiffs to act as they did.

The plaintiff Joseph LeRoy Peterson lived in the large house on the corner from 1935 to 1937 and during that period the plaintiff Kathryn Pedersen Peterson was a frequent visitor in the home. This was before the parents of plaintiff Joseph LeRoy Peterson bought the triplex next door. During that time and until 1944 there was a wooden fence which partially separated the house

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from the triplex. This fence was in line with the south edge of the sidewalk which runs along the south side of the triplex. The back yard used with the house included all the ground up to this sidewalk along the south side of the triplex and up to the old wooden fence. In other words, the yard used with the house included all the property now under dispute.

So both these plaintiffs came to know the back yard of the house as they used and saw it during the period from 1935 to 1937 and thereafter. In 1944, when plaintiffs put up the 4 ft. wire fence they did not arbitrarily place it; rather they replaced the portion of old wooden fence with new fence and extended the new fence across the yard so as to separate the house and triplex completely. The new fence was placed along the line dividing the two properties as they had always known it, including the period from 1935 to 1937 when the elder Petersons owned the large house but not the triplex.

Never at any time prior to January, 1951, had either of the plaintiffs been given any indication or reason to believe that the house property purchased by parents of plaintiff Joseph LeRoy Peterson did not extend back to the sidewalk south of the triplex and to the old wooden fence. However, they did have reason to believe that the house property included all that area, and that when the parents of Joseph LeRoy Peterson purchased the large house they purchased all the ground up to this sidewalk and wooden fence. Because of this, plaintiffs concluded that the fence line and legal descriptions in the abstracts on the house and triplex coincided, so far

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as the dividing line between the two properties is concerned.

When the time came for the sale of the triplex, plaintiffs relied on this assumption and on their past experience and furnished the abstract on the triplex to the real estate company for the preparation of the uniform real estate contract. The contract was not made up by the plaintiffs but by the real estate company which sold the triplex to the defendant. At the time the real estate contract was executed, plaintiffs were living in Blanding, Utah, and were not in Salt Lake City where they might have made a more careful check of the physical facts. Had the plaintiffs been in Salt Lake City at the time, they would perhaps be held to a higher degree of care, but being absent they were justified in relying on their past experience and permitting the description in the abstract to be used in the preparation of the contract.

Under the circumstances, plaintiffs were not negligent but acted as reasonably prudent persons would have acted when they executed the real estate contract, or certainly, if they were negligent, such negligence is excusable.

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CONCLUSION

It is clearly evident in this case that there was a mistake of fact; that it was a mutual mistake; and that the plaintiffs are entitled in equity to the relief they seek. To give to the defendant the 11 ft. 9 in. strip of ground in question would be to give her land she had no intention of acquiring when she purchased the triplex and which the plaintiffs had no intention of selling to her, and would do substantial harm to the plaintiffs in the use, enjoyment and value of their home. Therefore, the findings and decision of the lower court should be sustained.

Respectfully submitted,

McCULLOUGH, BOYCE & McCULLOUGH,

Attorneys for Plaintiffs and Respondents.

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